(22,481.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 860.

MORRIS GLICKSTEIN

vs.

THE UNITED STATES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 21, 1911.

1 In the United States Circuit Court of Appeals, Fifth Circuit.

Number 2098.

MORRIS GLICKSTEIN, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error.

Error to the District Court of the United States for the Southern District of Florida.

This cause coming on for hearing before the court, after full argument, it is ordered, in view of the many important questions arising upon the record and the doubt which the court have as to the correct decision thereof, that one question arising on the record in said cause shall be certified to the Supreme Court of the United States for its instruction thereon, and that, accompanying said question, there shall also be certified a statement from which such question can be understood, which statement is as follows:

On June 10, 1910, an indictment was found and filed in said district court against said Morris R. Glickstein, which is in substance as follows:

"The grand jurors of the United States, empaneled, sworn and charged at the term aforesaid of the court aforesaid, on their oath present that heretofore, to-wit, on the 2nd day of January, A. D. 1909, one Morris R. Glickstein was duly and lawfully adjudged a bankrupt within the meaning and purview of the Acts of Congress of the United States of America, by James W. Locke, United States District Judge for the Southern District of Florida; that said adjudication was had and took place upon the voluntary petition and request filed by him, the said Morris R. Glickstein, with the

2 Clerk of the United States District Court for the Southern District of Florida, on the 2nd day of January, A. D. 1909; that thereafter and in the regular proceedings of the administration of the said bankrupt's estate, there came on to be held, on the 26th day of January, A. D. 1909, at Jacksonville, Duval County, Florida, within said District, and within the jurisdiction of this court, before William A. Hallowes, Jr., a duly appointed, qualified and acting referee in bankruptcy for the counties of Duval, Nassau, Clay, St. Johns, Putnam, Baker, Brevard and Volusia, within said district, the first meeting of the creditors of the said Morris R. Glickstein, bankrupt, as aforesaid; that at said meeting, on said date, the bankrupt, Morris R. Glickstein, was, by the said William A. Hallowes, Jr., referee as aforesaid, duly sworn for examination by the creditors of him, the said Morris R. Glickstein, bankrupt, at said meeting that the testimony which he, the said Morris R. Glickstein, bankrupt, should give in said examination should be the truth, the whole truth, and nothing but the truth, the said William A. Hallowes, Jr., as referee in bankruptcy as aforesaid, as such referee in bankruptcy,

then and there having due and competent authority to administer such oath to said Morris R. Glickstein, bankrupt; that the number of trunks of goods sent by him, the said Morris R. Glickstein, the said bankrupt, from Jacksonville, Duval County, Florida, to St Augustine, St. Johns County, Florida, to go into the store of him, the said Morris R. Glickstein, bankrupt, at said St. Augustine, then and there became a material question at said examination; and the said Morris R. Glickstein, being so sworn as aforesaid, did then and there wilfully and contrary to his said oath, testify in substance as follows: that the total number of trunks of goods sent by him, the said Morris R. Glickstein, bankrupt, from Jacksonville, Duval County, Florida, to St. Augustine, St. Johns County, Florida, to go into the store of him, the said Morris R. Glickstein, bankrupt, at St. Augustine aforesaid, was two, whereas, in truth and in fact, the total number of trunks of goods sent by him, the said Morris R. Glickstein, bankrupt, from said Jacksonville to said St. Augustine, to go into the store of him, the said Morris R. Glickstein, bankrupt, at said St. Augustine, was a greater and much larger number of trunks (the exact number thereof being to said grand jurors unknown) as he, the said Morris R. Glickstein, bankrupt, then and there well knew; and he, the said Morris R. Glickstein, bankrupt, did not then and there believe that the total number of trunks of goods sent by him, the said Morris R. Glickstein, bankrupt, from said Jacksonville to said St. Augustine, to go into the store of him, the said Morris R Glickstein, bankrupt, at said St. Augustine, was two;

3 "And so the grand jurors aforesaid, upon their oath aforesaid, do say, that the said Morris R. Glickstein, bankrupt, in the manner and form aforesaid, having taken an oath before a competent tribunal, in a case wherein a law of the said United States authorizes an oath to be administered, that he would truly depose and testify, wilfully and contrary to his said oath did depose and state material matters which he did not then believe to be true, and thereby did commit wilful and corrupt perjury; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States."

The said Glickstein demurred to said indictment, and as grounds of demurrer, among others, alleged the following:

"(*a*) A prosecution for perjury against a bankrupt at a meeting of his creditors will not lie."

"(*b*) The indictment was based upon testimony given by the bankrupt affecting the administration and settlement of his estate."

"(*c*) A person cannot be compelled in any criminal case to be a witness against himself."

The district court overruled the demurrer, and a plea of "not guilty" was entered. On the trial, the United States offered to prove that Glickstein, at the first meeting of his creditors, after being duly sworn, testified, in substance, as charged in said indictment. By his attorney, Glickstein objected to the admissibility and legality of such evidence, alleging as grounds of objection, among others the following:

"(*a*) A prosecution for perjury against a bankrupt at a meeting of his creditors will not lie."

"(*b*) It appears that the testimony which the witness is asked to give was testimony given in evidence by the bankrupt affecting the administration and settlement of the bankrupt's estate."

"(*c*) A person cannot be compelled in any criminal case to be a witness against himself."

4 These objections were overruled, and this evidence was received. Exceptions to these and many other rulings of the court were reserved. The defendant was convicted, and sued out this writ of error; and assigns said rulings and twenty others as errors.

Section 7 of the Bankruptcy Act of 1898 provides that:

"The bankrupt shall * * * (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding."

The question certified is as follows:

Is said subsection 9 and the immunity afforded by it applicable to a prosecution for perjury committed by the bankrupt when examined under it?

DON A. PARDEE,
A. P. McCORMICK,
DAVID D. SHELBY,
Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Sitting in said Case.

Filed 3 day of Jan'y, 1911, Charles H. Lednum, Clerk of the United States Circuit Court of Appeals.

5 UNITED STATES OF AMERICA,
Fifth Judicial Circuit, ss:

I, Charles H. Lednum, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of Morris R. Glickstein, plaintiff in error, versus The United States, defendant in error, was duly filed and entered of record in my office by order of said court, and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said court, at the City of New Orleans, Louisiana this 3d day of January, A. D. 1911.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Endorsed on cover: File No. 22,481. U. S. Circuit Court Appeals 5th Circuit. Term No. 860. Morris Glickstein vs. The United States. Filed January 16th, 1911. File No. 22,481.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

MORRIS GLICKSTEIN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 860.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION TO ADVANCE.

This is a certification of a question by the Circuit Court of Appeals for the Fifth Circuit.

Morris Glickstein was indicted on June 10, 1910, in the District Court of the United States for the Southern District of Florida, under section 5392, for perjury. The indictment charges that on January 2, 1909, Glickstein had been duly and lawfully adjudged a bankrupt by the United States district judge for the Southern District of Florida upon his voluntary petition and request; that thereafter, in the regular proceedings in the administration of the bankrupt's estate, there was held on January 26, 1909, before a duly appointed, qualified, and acting referee in bankruptcy, the first meeting of the creditors of Glickstein; that at said meeting Glickstein was sworn by the referee for examination by the creditors; that a material question as to the number of trunks of goods

sent by him, Glickstein, from Jacksonville, Fla., to St. Augustine, Fla., to go into his store, was asked, and that willfully and contrary to his oath he testified in substance that two trunks had been sent, whereas, in truth and in fact, the total number of trunks of goods sent by him to go into his store was a greater and much larger number.

A demurrer to the indictment was filed on the grounds that "(*a*) a prosecution for perjury against a bankrupt at a meeting of his creditors will not lie; (*b*) the indictment was based upon testimony given by the bankrupt affecting the administration and settlement of his estate; (*c*) a person can not be compelled in any criminal case to be a witness against himself."

The District Court overruled the demurrer. On the trial, the United States offered to prove that Glickstein at the first meeting of his creditors, after being duly sworn, testified, in substance, as charged in the indictment. This testimony was objected to on the ground stated in the demurrer. The objections were overruled, exceptions taken, the defendant was convicted and sued out a writ of error from the Circuit Court of Appeals for the Fifth Circuit.

Section 7 of the bankruptcy act of 1898 provides that—

> The bankrupt shall * * * when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy,

> his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

The Circuit Court of Appeals has certified the following question:

> Is said subsection 9 and the immunity afforded by it applicable to a prosecution for perjury committed by the bankrupt when examined under it?

In accordance with rule 26, section 3, the Solicitor General moves the court to advance the case on the docket and set it down for hearing at such time during the next October term as may be convenient to the court.

Notice of this motion has been served on opposing counsel.

FREDERICK W. LEHMANN,
Solicitor General.

APRIL, 1911.

○

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910

No. 860.

MORRIS GLICKSTEIN

VS.

THE UNITED STATES

BRIEF FOR PLAINTIFF IN ERROR

JOHN E. HARTRIDGE

N. P. BRYAN

ATTORNEYS FOR PLAINTIFF IN ERROR.

THE FLORIDIAN.

SUPREME COURT OF THE UNITED STATES

No. 860.

Morris Glickstein,
Plaintiff in Error.

vs.

United States,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

I.
STATEMENT.

This case is here on certificate from the United States Circuit Court of Appeals for the Fifth Circuit.

As shown by the certificate, Plaintiff in Error, a bankrupt, was indicted and convicted of perjury in the giving of testimony before a referee in bankruptcy at the first meeting of his creditors.

Demurrer was filed to the indictment and objection made to the introduction of testimony given by plaintiff in error at said meeting of his creditors, upon the following grounds:

1. A prosecution for perjury against a bankrupt at a meeting of his creditors will not lie.

2. The indictment was based upon testimony given by the bankrupt affecting the administration and settlement of his estate.

3. It appears that the testimony which the witness is asked to give was testimony given in evidence by the bankrupt affecting the administration and settlement of the bankrupt's estate.

4. A person cannot be compelled in any criminal case to be a witness against himself.

The demurrer and objections were overruled, and the evidence received.

Section 7 of the Bankruptcy Act of 1898 provides: "The bankrupt shall * * * * *(9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealing with his creditors and other persons, the amount, kind, and whereabouts of his property, and in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding."

II.

ERRORS ASSIGNED.

Writ of Error was sued out, and the Circuit Court of Appeals certifies to this Court the following question:

"Is said subsection 9 and the immunity afforded by it applicable to a prosecution for perjury committed by the bankrupt when examined under it?"

III.

ARGUMENT.

The decision of the question certified depends upon the construction of the following immunity provision contained in said subsection 9: "But no testimony given by him (the bankrupt) shall be offered in evidence against him in any criminal proceeding."

The record conclusively shows:

1. That plaintiff in error was a bankrupt.
2. That he testified as charged.
3. That his testimony before the referee was offered and received in evidence against him, over his objection.
4. That this is a criminal proceeding.

The prosecution confessedly did exactly what the statute provides it cannot do. "The testimony given by him

was offered in evidence against him in a criminal proceeding."

The indictment and sentence are necessarily based upon the testimony of the bankrupt at the first meeting of his creditors. Without it there is no foundation for the prosecution.

The first and simplest rule of construction is that when the language of a constitution or statute is clear, plain and without ambiguity, effect must be given to it; in such event there is no uncertainty to be explained, there is nothing to be construed.

We cite:

Sturges vs. Crowninshield, 4 Wheat 122, text 202:

"Where words conflict with each other, where the different clauses of an instrument bear upon each other and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision not contradicted by any other provision in the same instrument is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would without hesitation unite in rejecting the application."

Board of County Commissioners vs. Rollins, 130 U. S. 662:

"To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort in all cases is to the natural signification of the words in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be

accepted, and neither the courts nor the legislature have the right to add to it or take from it. (Citing cases) So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed and consequently no room is left for construction."

Yerke vs. United States, 173, U. S. 439 text 442:

"The act of 1891 is not ambiguous. Its clearness does not need and may not be construed by analogies from other statutes or from the practice under other statutes. The rule is elemental that language which is clear needs no construction."

Hamilton vs. Rathbone, 175 U. S. 414, text 419:

"The general rule is perfectly well settled that where a statute is of doubtful meaning and susceptible upon its face of two constructions the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face and when standing alone it is fairly susceptible of but one construction that construction must be given to it."

Also text 421:

"Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity that an extended review of them is quite unnecessary."

United States vs. Fisher, 2 Cranch 358:

United States vs. Goldenberg, 168 U. S. 95.

Lewis's Sutherland on Staturoty Constitution (second edition) sections 366 and 367.

The position of the prosecution is that the statute does not mean what it says, and that the only immunity intended relates to past transactions connected with the

bankrupt's business as to which he might testify. To sustain this position counsel relied in the lower courts upon the two cases of Edelstein vs. United States, (eighth circuit), 149 Fed. 636; Wechsler vs. United States (second circuit,) 158 Fed. 579.

Edelstein was prosecuted for perjury committed in a proceeding to investigate the truth of specifications filed against his application for discharge. The judgment was affirmed by the Circuit Court of Appeals and this court denied a petition for a writ of certiorari.

It is therefore urged that the denial of the petition in the Edelstein case is controlling authority that this prosecution will lie. We submit that such a conclusion is unwarranted.

In the first place, Edelstein, as above stated, was prosecuted for perjury committed in his own application for discharge under section 14 of the act, which has no immunity clause, as is the case under section 7(9).

Again:

Plaintiff in error was required to submit to examination "when present at first meeting of his creditors," but Edelstein was under no duty to testify except "at such other times as the court shall order" (section 7 (9)), and the case as reported does not show that the Court ordered him to testify. For all that appears, his testimony was voluntary, and if so he waived his constitutional privilege, as any other defendant does who voluntarily becomes a witness.

The conclusion reached in the Edelstein case may have been proper, for the reasons above stated. At least, it is so easily distinguishable in its facts, and in the portions of the Bankruptcy Act involved, that its decision cannot logically be cited against the contention we make in the case at bar.

It is quite true, however, that the doctrine laid down in the Edelstein case is opposed to the broad and general contention we make as to the meaning of the Fifth Amendment and the immunity afforded by subsection 9 of section 7 of the Bankruptcy Act.

The majority opinion in the Edelstein case cites Counselman vs. Hitchcock, 142 U. S. 547, decided January 11, 1892, in which this Court held Counselman could not be compelled to testify, because the immunity afforded by section 860 of the Revised Statutes is not as broad as the constitutional guarantee.

Section 860, Revised Statutes, provides: "No pleading of a party nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence or in any manner used against him or his property or estate in any court of the United States in any criminal proceeding or for the enforcement of any penalty or forfeiture: provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

In view of the opinion in the Counselman case, Congress passed the act of February 11, 1893, which provides: "No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission * * * * * * * *on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction or thing concerning which he may testify or produce evidence, documentary or otherwise, before said Commission or in obedience to its subpoena or the subpoena of either of

them or in any such case or proceeding; provided, that no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

This court, in Brown vs. Walker, 161 U. S. 591, decided March 23, 1896, by a majority of one, held that this act of 1893 satisfied the constitutional guaranty of protection of a person being compelled in any criminal proceeding to be a witness against himself.

These two decisions were fresh in the mind of congress when it came to pass the Bankruptcy Act of 1898. If we ignore for the moment, the universal rule of statutory construction above invoked, and, in disregard thereof, seek the legislative intent outside of the Bankruptcy Act, we submit that a brief examination of section 860 of the Revised Statutes and Act of February 11, 1893, will lead to the conclusion that section 7 (9) means what it says, and that the testimony of the bankrupt at a meeting of his creditors cannot be used against him in this criminal proceeding.

In 1868, when section 860 was adopted congress deemed it necessary in order to save the right to prosecute for perjury to limit the broad provisions of the statute. It is significant that in the opinion of the law-making power the language was sufficient to prevent a prosecution for perjury but for the proviso. If it had been intended to retain that right in the Bankruptcy Act of 1898, a similar proviso would have been added.

The "Testimony Act" of 1893 is designed to grant immunity "for or on account of any transaction, matter or thing concerning which he may testify or produce evidence" etc. Here the language used does not purport to protect a witness against perjury or false swearing but is intended to grant immunity for any crime the witness may have committed in any such transaction, matter or thing concerning which he may testify. An indictment for perjury might have been held good even with-

out the proviso, but the law-making power, in order to save any question in regard to its intention, added the proviso authorizing prosecutions for perjury.

Two years after this immunity act was held sufficient Congress passed the Bankruptcy Act.

It is stated, even in the Edelstein case, that a literal interpretation of this act would prevent the use of the bankrupt's testimony in a prosecution against him for perjury. If Congress was careful to limit this immunity by a proviso in legislation which did not seem to confer it, why should it not have done so in legislation containing language so broad as unquestionably to confer it if the language used be given its usual, plain and clear effect?

Under the immunity act of 1893 the witness cannot be prosecuted for any transaction, matter or thing concerning which he may testify; and therefore, of course, his testimony could not be used against him; but the Bankruptcy Act does not prevent the bankrupt from being prosecuted. Therefore, except for the immunity clause, his testimony could have been used against him. So, there was a clear purpose to induce him, inasmuch as under the Counselman case he could not be coerced, to testify; and the inducement offered is exemption from prosecution for anything he might say. It was thought so important to give his creditors an opportunity to examine and cross-examine him about the conduct of his business and the cause of his bankruptcy as to justify a waiver of prosecution for any testimony he might give.

There is nothing in the language used to authorize the conclusion of the majority opinion in the Edelstein case that "any criminal proceeding" means only such criminal proceedings as might arise under the Bankruptcy Act.

This Court, in Burrell v. Montana, 194 U. S. 572, held that the immunity was applicable in a prosecution for an offense other than one connected with bankruptcy.

We here call the court's attention to the able dissenting opinion of Judge Phillips in the Edelstein case, and especially to the following language: "No case could be made out against him under an indictment for perjury without offering in evidence his testimony given in the examination. It would be little less than a fraud upon him to induce him to take the witness stand and testify under statutory language so broad, and then hold that the immunity was intended by Congress to apply only to the instance where he might be indicted for having sworn falsely in some other matter."

The Wechsler case, cited by counsel for the United States, is the only case we have been able to find which follows the doctrine of the Edelstein case, but the court in that case very frankly gives as its reasons for the decision the authority of the Edelstein case and says: "Whatever might be our conclusion were the question presented as a novel one, we are clearly of the opinion that we should follow the construction adopted in the eighth circuit and left undisturbed by the Supreme Court so that in a matter of so much importance the decisions of the federal courts in the different circuits may be uniform."

The other federal courts which have had to deal with this question have uniformly construed the immunity afforded to be applicable to cases similar to this. For a collection of the authorities we cite:—

Remington on Bankruptcy, section 1558.
See also:
United States vs. Simon, 146 Fed. 89.
Jacobs vs. United States, 161 Fed. 694.
In re Marks, 102 Fed. 314.
In re Logan, 102 Fed. 876.
In re Gaylord, 112 Fed. 668.
In re Leslie, 119 Fed. 406.

While this question has never been before this court in the form presented, it has been considered in Burrell vs. Montana, supra. Burrell was convicted in the state court of the crime of obtaining money under false pretenses. The judgment was affirmed by the supreme court of Montana. The writ of error was issued by this court to review the judgment which affirmed the conviction. The false pretense consisted of a false statement in writing concerning Burrell's assets and liabilities. On his cross-examination he was questioned in regard to statements made by him in his testimony before a referee in bankruptcy proceedings; no objection was made. The trial court instructed the jury upon the weight of the admission made by him as to his testimony in bankruptcy. This court in its opinion said: "The instruction seems to oppose the provisions of the statute, but the circumstances of the case must be considered. There was no objection made to the introduction of the testimony, and, as we understand the instruction, it was but the expression of the value of the testimony. * * * * * * * * A narrower contention might have been yielded to by the state courts. It certainly should have been submitted to them. The statute does not prohibit the use of testimony against the consent of him who gave it. It prescribes a rule of competency of evidence which may or may not be insisted upon. It does not declare a policy the protection of which cannot be waived. And the time to avail of it is when the testimony is offered."

Again:

"There is no ambiguity in section 7 of the Bankruptcy Act. It requires a bankrupt to submit to an examination concerning his property and affairs and provides: 'But no testimony given by him shall be offered in evidence against him in any criminal proceeding.' It does not say that he shall be exempt from prosecution but only in case of prosecution his testimony cannot be used against him."

This decision establishes the proposition that unless the bankrupt claims the protection of the immunity provision by objecting to the introduction of testimony given by him in a bankruptcy proceeding, such testimony may be used in a criminal proceeding against him.

It seems to us that the converse of this proposition must also be true; that if objection be made to the introduction of such testimony it must be excluded.

We respectfully submit that said subjection 9 and the immunity afforded by it is applicable to a prosecution for perjury committed by the bankrupt when examined under it.

John E. Hartridge

N. P. Bryan

Attorneys for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

MORRIS GLICKSTEIN
v.
THE UNITED STATES. } No. 486.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

Morris Glickstein was on the 2d day of January, 1909, duly adjudicated to be a bankrupt by the District Court of the Southern District of Florida.

On the 26th day of January, 1909, he was examined upon oath at a meeting of his creditors before the referee in bankruptcy with regard to the disposition of his property made by him, the examination being made under section 7 of the bankruptcy act of 1898, which, among other things, provides that:

> The bankrupt shall . . . (9) when present at the first meeting of his creditors, and at

> such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding. (30 Stat., 544, 548).

On June 10, 1910, Glickstein was indicted for perjury committed in the course of that examination.

He demurred to the indictment upon the ground that section 7 of the bankruptcy act gave him immunity from prosecution for perjury committed in the examination.

His demurrer was overruled. He entered a plea of not guilty. Upon the trial the prosecution offered evidence of what he had testified to on the examination and was charged by the indictment to be false. He objected to this, but his objection was overruled and he was convicted. He brought his case to the Circuit Court of Appeals for the Fifth Circuit by writ of error, and that court certifies to this court the single question, viz:

> Is said subsection 9 (of sec. 7 of the bankruptcy act) and the immunity offered by it applicable to a prosecution for perjury committed by the bankrupt when examined under it?

PROPOSITION AND AUTHORITIES.

The criminal proceeding intended by the statute, in which the testimony given by the bankrupt at the examination may not be offered against him, is a proceeding for a past offense, and not a proceeding for perjury committed in the examination itself.

Edelstein v. *United States*, 149 Fed. 636;
Wechsler v. *United States*, 158 Fed. 579;
United States v. *Brod*, 176 Fed. 165;
Holy Trinity Church v. *United States*, 143 U. S., 457;
People v. *Cahill*, 126 App. Div. Reports (N. Y.), 391.

ARGUMENT.

The only constitutional limitation upon the obligation of a person called as a witness to testify is that imposed by the Fifth Article of Amendment, viz: "No person shall be * * * compelled in any criminal case to be a witness against himself."

This has been extended by construction to mean that "no person shall be compelled in any case to give any testimony which would tend to incriminate him."

While extended in this respect it has been by construction restricted in another. A person may be compelled in any case, in which he is properly called to testify, to be a witness against himself, even as to a criminal transaction in which he has been engaged, if he is no longer subject to punishment therefor, as where he has been pardoned or his offense is barred by the statute of limitations. The protection is not

against mere humiliation or disgrace resulting from the disclosure, but only against punishment.

To adduce against a person under a charge of perjury the testimony given by him upon which that charge is predicated is not a violation of the Amendment. If it were, all perjury would be exempt from punishment.

The practical effect, then, of the Amendment is that no person may be compelled in any case to testify concerning anything if his testimony would tend to convict him of a past offense.

Public policy often may and does require, however, that such testimony be given, but, under the Amendment, that testimony can be had only upon the condition that the individual right secured by the Amendment is not impaired. The witness must not be exposed to the peril of punishment, and so he must be accorded an amnesty as broad in its protection as that which his silence could secure for him.

The presumption is strong, and, unless a contrary purpose is clearly disclosed, conclusive, that the amnesty is not broader than the protection of the Constitution, and therefore does not extend its grace to perjury committed in the testimony given under the sanction of the amnesty.

Public authority only can grant that amnesty, and the grant must be presumed to have been made only for public reasons.

No public purpose can be served by perjury, and amnesty will not therefore extend, beyond the past

transaction to which the testimony relates, to perjury inherent in the testimony itself.

When the witness takes the stand the amnesty shields him against everything in the past; as to the future he is like any other witness.

The amnesty is a pardon, not a license.

The bankrupt law, reasonably considered, discloses no purpose to give immunity to perjury in the testimony it invites.

The law recognizes that there may be fraud existing in the cases arising under it. The temptation to concealment of assets and to improper preferences is strong when insolvency is apprehended. And so to uncover all assets, and to disclose all preferences, the law provides for the examination of the bankrupt, who knows what his assets are and what preferences he has made. It does this that there may be an equitable distribution of his estate, notwithstanding anything he may have been tempted to do.

The examination is to be as to "the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, *all matters which may affect the administration and settlement of his estate.*" The last clause of this provision shows the purpose of the whole, and that purpose, so far as the bankrupt can aid, can be aided only by his telling the truth. And that he may not fear to tell the truth, and that any wrongs he may have committed against his creditors may be re-

dressed, the testimony he gives shall not be offered in evidence against him in any criminal proceeding.

But criminal proceeding for what? Considering the purpose of the law it is manifestly a criminal proceeding for something disclosed by his testimony relative to the matters concerning which he was examined.

This was the view taken of the law by the Court of Appeals for the Eighth Circuit in *Edelstein* v. *United States*, 149 Fed., 636.

The court considered not only the immunity provision but the context as well, and so determined that the criminal proceedings in which the testimony of the bankrupt might not be offered against him were "such as might arise out of the conduct of his business, the disposition of his property, and other past transactions, about which alone the statute authorized the examination in question to be made" (p. 643). And, further, the court said (pp. 643, 644):

> It would seem that the statute in question was not intended to confer a broader immunity, so far as it was applicable, than the constitutional provision does in its scope of operation. To hold that the statute protects a bankrupt from the use of his evidence in a prosecution for perjury while actually testifying would defeat the obvious purposes of the act. . . . Moreover, it would, in effect, secure to the bankrupt the immunity in question for violating his part of the compact, namely, to testify—that is, to testify truthfully—by virtue of which he secured a right to

> the immunity. We are not willing to impute to Congress any such contradictory and absurd purpose. The words "any criminal proceeding" cannot sensibly or reasonably be construed so literally and generally as to include the criminal proceeding provided by law for false swearing in giving his testimony. They obviously have reference to such criminal proceedings as arise out of past transactions, about which the bankrupt is called to testify.

Edelstein sought a review of his case by this court upon petition for a writ of certiorari, but the writ was denied (205 U. S., 543).

The *Edelstein* case was followed by the Court of Appeals for the Second Circuit in *Wechsler* v. *United States* (158 Fed., 579) and by the Circuit Court for the Northern District of Georgia in *United States* v. *Brod* (176 Fed., 165).

Section 7 of the bankruptcy act has been under consideration in a number of other cases, but in only one of them was involved the precise question here presented.

In re Marx et al. (102 Fed., 676) and *In re Logan* (102 Fed., 876) were both decided by the District Court of Kentucky. In each case there was an application by the bankrupt for discharge, opposed by creditors on the ground that he had perjured himself in the examination provided for by section seven of the bankrupt act. Judge Evans held that the testimony given by the bankrupt could not be used against him, even under an indictment for making a false oath, and as without the use of the testimony

he could not be convicted, this was legally tantamount to his being innocent and *ergo* he was entitled to his discharge notwithstanding the act says he shall not be discharged if he has committed an offense punishable by the act, and making a false oath in or in relation to the bankruptcy proceedings is so punishable.

This interpretation has not been followed in any other case.

In re Dow's Estate (105 Fed., 889), *In re Goodale* (109 Fed., 783), and *In re Leslie* (119 Fed., 406) were all adjudications by district courts upon applications by the bankrupts for discharge. In each of these cases the court held that the application for discharge was not a criminal proceeding, and so it might be shown in resistance to the application that the bankrupt had testified falsely on his examination. Whether he might be prosecuted criminally for his perjury, or whether his testimony at the examination might be given in evidence against him on the prosecution, was in no wise involved.

In re Gaylord (112 Fed., 668) was decided by the Court of Appeals for the Second Circuit. It was also an application by the bankrupt for discharge. The court refused to follow the *Evans* case, saying (p. 669):

> . . . The false oath is none the less an offense because it cannot be proved. If it is in the category of offenses for which the punishment is imprisonment by the terms of section 29, it matters not whether the bankrupt can or cannot be convicted of it. We

have been referred to the case of In re Marx (D. C.) 102 Fed. 676, as sanctioning a different conclusion, but we are unable to assent to the reasoning of that decision.

The case directly in point is *United States* v. *Simon* (146 Fed., 89). This was an indictment for perjury committed by the bankrupt upon his examination under the act. There was a demurrer to the indictment. The court held that the bankruptcy act did not give complete immunity, and so perjury committed upon the examination was an offense, but not provable except by consent of the bankrupt, because the testimony on which perjury was predicated could not be adduced against him upon the trial of the indictment without his consent, and as the demurrer was notice by the defendant that he would not consent, and consequently the offense charged could never be proven, the demurrer to the indictment should be sustained.

It was there contended for the Government that there was an implied exception, in the bankruptcy act, of perjury committed at the examination, and the court said respecting this (pp. 93, 94):

> The argument in support of this contention being that it is simply an outrage upon justice to permit a bankrupt to actively participate in an attempt to commit a fraud upon his creditors, by giving perjured testimony in support of fictitious claims, and by a literal construction of the statute shield him from the consequences to which others who commit the

> crime of perjury are exposed. This argument should have convincing force if addressed to the legislative branch of the government, but addressed to a court it is nothing else than a temptation to overstep the line marking the limit of judicial power. The omission of the proviso annexed to section 860, Rev. St. U. S., and of any words of equivalent import, naturally suggests the inquiry, why the omission? If it was intentional, then necessarily Congress did not create an exception to the prohibition of the use of a bankrupt's testimony, and if it may be regarded as an inadvertent omission, still there is no exception created by Congress, and the court is not authorized to revise the statutes and amend them by ingrafting exceptions and provisos either to correct supposed inadvertent errors or to overrule the will of the legislative branch of the government. The rule on this subject has been tersely expressed by Mr. Justice Davis in this axiom: "There is no authority to import a word into a statute in order to change its meaning." *Newhall* v. *Sanger*, 92 U. S. 765.

We quite agree that there is no authority to import a word into a statute in order to *change* its meaning, but there is the highest authority for using reason to *ascertain* the meaning of a statute and reading it accordingly, and this may involve either an extension or restriction of its literal terms. There is a spirit of the law as well as a letter. "The letter killeth, but the spirit giveth life."

The act of February 26, 1885 (23 Stat., 332), provided in its first section:

> That from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories, or the District of Columbia.

The scope of this statute was involved in *Holy Trinity Church* v. *United States* (143 U. S., 457).

Trinity Church made a contract with E. Walpole Warren, an alien then residing in England, by which he was to remove to New York City and enter the service of the church as rector and pastor. This was charged to be a violation of the act set out above.

The opinion by Mr. Justice Brewer is a very elaborate one and cites many authorities. We content ourselves with quoting the fourth paragraph, viz:

> It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words labor and service both

used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added "of any kind;" and, further, as noticed by the Circuit Judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. As said in Plowden, 205: "From which cases, it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to extend to

> but some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter, they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the legislature, which they have collected sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances" (pp. 458–459).

Here, then, was a limitation imposed upon the broad literal terms of the statute or an exception imported into it, not, however, to *change* its meaning, but to *declare* it.

Judge Philips in his dissenting opinion in *Edelstein* v. *United States, supra*, and Judge Hanford in *United States* v. *Simon, supra*, lay stress upon the proviso of section 860, Revised Statutes of the United States, viz:

> *Provided*, That this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid.

Attention is called to other immunity statutes containing like provisos or exceptions. It is assumed that such a proviso or exception is uniformly employed where perjury committed upon the examination is to be subjected to punishment, and it is argued that an express proviso or exception being thus usual, where none is made, none is intended.

If every statute of the land emanated from the same mind we might expect that the same meaning would be expressed, if not uniformly at least usually, in the same terms, and more stress could then fairly be laid upon verbal niceties in the construction of statutes. But different statutes are the products of different minds and the same intent may be, and is, variously expressed.

One man in framing a statute giving immunity, entire or partial, as a means of securing testimony, may be of opinion that because perjury in giving that testimony so palpably contravenes every purpose of the law as necessarily to forfeit its grace, no exception of it need be stated, while another man out of an abundance or excess of caution will state the exception.

An examination of the statutes of different States shows that no hard and fast rule is followed in framing laws of this kind. Examples of statutes giving immunity to incriminated persons who are called to testify and making no exception of perjury committed in giving that testimony are found in the following:

Revised Statutes of Arkansas of 1874, sec. 2479. (One accomplice testifying against another.)

Revised Statutes of Connecticut of 1902, sec. 508. (Gaming.)

Kerr's Cyclo. Codes of Cal., Penal Code, sec. 232. (Dueling.)

Rev. Stat. of Colo., 1908, sec. 5456. (Railroad commission act.)

General Statutes of Florida, 1906, sec. 2917. (State railroad commission.)

Code of Iowa, 1897, sec. 4612. (Gaming, etc.)

Compiled laws of Michigan, Dewey, 1872, vol. 2, sec. 6583. (Certain proceedings against corporations.)

Minnesota Pub. Stat., 1849–1858, Sherburne & Hollinshead, p. 726, c. 95, sec. 5. (Gaming.)

Revised Statutes of Missouri, 1899, sec. 8989. (Antitrust law.)

Compiled Statutes of Nebraska (Annotated), 1907, p. 1204. (State railroad commission.)

General Statutes of New Hampshire, 1867, c. 99, sec. 20. (Agent testifying against principal in liquor cases.)

New Jersey Revised Statutes, 1877, p. 356, sec. 109. (Election bribery.)

Laws of New York, 1853, c. 539, sec. 14. (Election bribery.)

North Carolina, Pell's Revisal, 1908, vol. 1, sec. 1638a. (Antitrust law.)

Revised Codes of North Dakota, 1895, sec. 7236. (Gaming.)

Public Laws of Pennsylvania, 1897, Act No. 191, sec. 2, p. 238. (Setting aside fraudulent judgments.)

Compiled Laws of South Dakota, 1910, vol. 2, Penal Code, sec. 402. (Gaming.)

Compiled Laws of Utah, 1907, sec. 4187. (Dueling.)

West Virginia Code Supplement, 1909, sec. 1117c1. (Proceeding against officers of certain corporations for contributing corporate money for political purposes.)

Wisconsin Statutes, 1898, Sanborn & Berryman, vol. 2, sec. 3228. (Quo warranto proceedings against corporations, etc.)

Revised Statutes of Wyoming, 1899, sec. 2184. (Gaming.)

In none of these cases can there be suggested any reason for presuming that the legislature intended to give immunity to perjury that would pervert every purpose of the law. It certainly was not intended that a person guilty of one of these offenses might make a false pretense of contrition and under such pretense get a license to testify falsely and so shield his associates in crime, or inculpate someone who was innocent. The sole purpose of bestowing grace was to get truth. and the only reasonable presumption is that the lawmakers believed this to be so plainly implied that it needed not to be expressed.

There were different statutes of New York like those cited above from the various States. The penal code which went into effect in 1881 provided expressly that these statutes "do not forbid such evidence being proved against such person upon any charge of perjury committed in such examination."

The purpose of this latter provision was considered in *People* v. *Cahill* (126 App. Div. Reports, N. Y., 391). The court said (p. 395):

> It would be a still stranger notion that because the defendant was under legal compulsion to testify before the deputy commissioner by reason of the immunity statute,

> he was free to testify falsely without being amenable to the penalties of perjury, which would be the case if the evidence he gave could not be given in evidence in a criminal prosecution of him for perjury in the giving of it. *Out of abundance of caution it is provided by the penal code that such evidence may be proved in such a prosecution* (*sec. 712*); but it must be manifest that the immunity is only given for past crimes, not for future ones. It could not be for perjury committed in the examination; nor can it be construed that the general words of the immunity statute that the evidence shall not thereafter be used against the witness in any prosecution has reference to crimes he may afterwards commit. It has reference only to past crimes by him which his testimony might disclose or lead to the discovery of.

The proviso or exception in every case in which it appears is the result merely of that caution which too generally in legal speech and writing expresses itself in redundant verbiage.

The effect of the construction contended for by the bankrupt is so abhorrent to justice that it must be rejected if any other is reasonably permitted by the language used. To begin with, that construction would extend the immunity of the statute to cases not at all within its scope and purpose. As was said in the *Edelstein* case, this immunity provision "finds its inspiration in the fifth amendment to the national Constitution, which ordains that 'no person shall be compelled in any criminal case

to be a witness against himself.'" It implies that the bankrupt may have committed acts for which he is subject to punishment, but that there may be a fair administration of his estate he is invited to testify, under an oath to tell the truth, the whole truth, and nothing but the truth, upon the assurance that this testimony shall not be used against him in any criminal proceeding. Now it is said this immunity against this testimony extends not only to proceedings for past offenses, which might be prosecuted successfully without it, but also to a proceeding for the violation of the oath which was part of the compact under which he testified, and which can not be successfully prosecuted without that testimony, for the giving of that testimony is itself the crime. So be it. What is further true? It may be, and in most cases no doubt is the fact, that the bankrupt has committed no crime and stands in no need of any protection from the Fifth Article of Amendment, nor from any statute inspired by it, and still his testimony is desired and needed to aid in the proper administration of his estate.

He goes upon the stand and takes the oath to tell the truth, the whole truth, and nothing but the truth, and upon that instant the proviso extends its immunity to him, and his testimony may not be used against him in any prosecution for perjury in giving that testimony. We do, then, in the case of every bankrupt what we do in no other case—what is an anomaly in our jurisprudence—we administer an oath to the bankrupt as a witness

with all the solemnity of legal form and ceremony and upon the instant withdraw from that oath every legal sanction and substitute a free and unlimited license to lie for the pains and penalties of perjury.

Believing that no such perversion and mockery of justice was intended by Congress, it is respectfully submitted that the question propounded by the Circuit Court of Appeals should be answered in the negative.

F. W. LEHMANN,
Solicitor General.

JUNE, 1911.

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GLICKSTEIN *v.* UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 486. Submitted October 19, 1911.—Decided December 4, 1911.

Subdivision 9 of § 7 of the Bankruptcy Act of 1898 and the immunity afforded by it are not applicable to a prosecution for perjury committed by the bankrupt when examined under it.

The constitutional guarantee of the Fifth Amendment does not deprive the law-making authority of the power to compel the giving of testimony, even though the testimony when given may serve to incriminate the witness, provided complete immunity be accorded.

The sanction of an oath and imposition of punishment for false swearing are inherent parts of the power to compel giving testimony and are not prohibited by immunity as to self-incrimination.

The immunity afforded by the Fifth Amendment relates to the past; it is not a license to the person testifying to commit perjury either under the provisions as to the giving of testimony in § 860, Rev. Stat., or of the Bankruptcy Act of 1898.

The provisions in the Bankruptcy Act compelling testimony do not confer an immunity wider than that conferred by the Constitution itself.

A statute in regard to giving testimony, which does not provide for prosecution for perjury, will not be construed as permitting perjury because in other statutes in that regard Congress has, from abundant caution, inserted provisions as to prosecution for perjury.

Edelstein v. *United States*, 149 Fed. Rep. 636; *Wechler* v. *United States*, 158 Fed. Rep. 579, approved. *In re Marx*, 102 Fed. Rep. 679; *In re Logan*, 102 Fed. Rep. 876, disapproved.

THE facts, which involve the construction of subdivision 9, § 7 of the Bankruptcy Act of 1898, are stated in the opinion.

Mr. John E. Hartridge and *Mr. N. P. Bryan* for Glickstein.

The Solicitor General for the United States.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Glickstein, an adjudicated bankrupt, was indicted for perjury in having falsely sworn in the bankruptcy proceeding, while under examination before a referee, as required by the seventh section, subdivision 9, of the Bankruptcy Act of 1898. The indictment was demurred to on the following grounds: "*a.* A prosecution for perjury against a bankrupt at a meeting of his creditors will not lie; *b.* The indictment was based upon testimony given by the bankrupt affecting the administration and settlement of his estate; *c.* A person cannot be compelled in any criminal case to be a witness against himself." At the trial which followed the overruling of the demurrer the testimony of Glickstein, which was the subject of the indictment, was offered and objected to on the same grounds upon which the demurrer was based, and exceptions were taken to the admission of the testimony in evidence.

When the legality of a conviction and sentence of Glickstein was before the court below, as the result of error prosecuted by him, the court, stating the facts which we have recited, certified the following question: "Is subsection 9 and the immunity afforded by it applicable to a prosecution for perjury committed by the bankrupt when examined under it?"

Section 7, subdivision 9, which we are required to consider in order to solve the question, is as follows:

"The bankrupt shall . . . (9) When present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given

by him shall be offered in evidence against him in any criminal proceeding."

It is difficult to determine from the contentions urged in favor of an affirmative answer, whether it is deemed the solution of the problem requires us to decide a question of constitutional right or simply calls for an interpretation of the provision of the Bankruptcy Act to which the question relates. To exclude irrelevant matter and to confine our attention to the precise subject to be passed upon, we state certain propositions which are not open to controversy because foreclosed by decisions of this court, or which if not expressly foreclosed are so indubitably the result of settled principles as to cause them also to be not subject to reasonable dispute.

1st. It is undoubted that the constitutional guarantee of the Fifth Amendment does not deprive the law-making authority of the power to compel the giving of testimony even although the testimony when given might serve to incriminate the one testifying, provided immunity be accorded, the immunity, of course, being required to be complete; that is to say, in all respects commensurate with the protection guaranteed by the constitutional limitation. The authorities which establish this elementary proposition are too numerous to be cited, and we therefore simply refer to a few of the leading cases on the subject. *Counselman* v. *Hitchcock*, 142 U. S. 547; *Brown* v. *Walker*, 161 U. S. 591; *Burrell* v. *Montana*, 194 U. S. 572, 578; *Jack* v. *Kansas*, 199 U. S. 372; *Ballmann* v. *Fagin*, 200 U. S. 186, 195; *Hale* v. *Henkel*, 201 U. S. 43, 66, and *Heike* v. *United States*, 217 U. S. 423.

2nd. As the authority, which the proposition just stated embraces exists, and as the sanction of an oath and the imposition of a punishment for false swearing are inherently a part of the power to compel the giving of testimony, they are included in that grant of authority and are not prohibited by the immunity as to self-incrimination. Of

course this proposition is essentially the resultant of the first, since unless it be well founded the first also must be wanting in foundation. This must be the result, as it cannot be conceived that there is power to compel the giving of testimony where no right exists to require that the testimony shall be given under such circumstances and safeguards as to compel it to be truthful. In other words, this is but to say that an authority which can only extend to the licensing of perjury is not a power to compel the giving of testimony. Of course, these propositions being true, it is also true that the immunity afforded by the constitutional guarantee relates to the past and does not endow the person who testifies with a license to commit perjury. That this is not disputable is shown by the fact that it has been accepted as self-evident in providing for immunity for one compelled to testify, as shown by the reservation in Rev. Stat., § 860, declaring that the immunity shall not extend to "exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid," and by a like provision, contained in the act of February 11, 1893, 27 Stat. 443, c. 83. The first of these provisions was considered in *Counselman* v. *Hitchcock*, *supra*, and the second in *Brown* v. *Walker*, *supra*, where it was expressly decided that the statute containing it complied with the constitutional guarantee.

With these propositions in hand it follows that the precise question for decision is, Did the guarantee of immunity contained in the ninth subdivision of § 7 of the Bankruptcy Act bar a prosecution for perjury for false swearing in giving testimony under the command of the section? In other words, the sole question is, Does the statute, in compelling the giving of testimony, confer an immunity wider than that guaranteed by the Constitution? The argument to maintain that it does is, that as the statute provides for immunity and does not contain the

reservation found in either § 860, Rev. Stat., or that embodied in the act of 1893, therefore, under the rule that the inclusion of one is the exclusion of the other, such reservation cannot be implied. Or, to state the proposition in another form, it is that as the statute in the immunity clause says, "But no testimony given by him (the witness who is compelled to be examined) shall be offered in evidence against him in any criminal proceeding," and as these words are unambiguous, there is no room for limiting the language so as to cause the immunity provision not to prohibit the offer of the testimony in a criminal prosecution for perjury. But the contention assumes the question for decision, since it excludes the possibility of construction when on the face of the statute the meaning attributed to the immunity clause cannot be given to it without destroying the words of the statute and frustrating its obvious object and intent. This may not be denied, since the statute expressly commands the giving of testimony, and its manifest purpose is to secure truthful testimony, while the limited and exclusive meaning which the contention attributes to the immunity clause would cause the section to be a mere license to commit perjury, and hence not to command the giving of testimony in the true sense of the word.

The argument that because the section does not contain an expression of the reservation of a right to prosecute for perjury in harmony with the reservations in Rev. Stat., § 860, and the act of 1893, therefore it is to be presumed that it was intended that no such right should exist, we think, simply begs the question for decision, since it is impossible in reason to conceive that Congress commanded the giving of testimony, and at the same time intended that false testimony might be given with impunity in the absence of the most express and specific command to that effect.

Bearing in mind the subject dealt with we think the reservation of the right to prosecute for perjury made in the

statutes to which we have referred was but the manifestation of abundant caution, and hence the absence of such reservation in the statute under consideration may not be taken as indicative of an intention on the part of Congress that perjury might be committed at pleasure.

Some of the considerations which we have pointed out were accurately expounded in *Edelstein* v. *United States*, 149 Fed. Rep. 636, by the Circuit Court of Appeals for the Eighth Circuit, and in *Wechsler* v. *United States*, 158 Fed. Rep. 579, by the Circuit Court of Appeals for the Second Circuit. And this leads us to observe that the necessary result of the conclusion now reached is to disapprove the opinions in *In re Marx et al.*, 102 Fed. Rep. 676, and *In re Logan*, 102 Fed. Rep. 876.

It follows that the question propounded must receive a negative answer, and our order will be,

Question certified answered No.